

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE BOARD OF DENTISTRY

In the Matter of Mohamed El Deeb, D.D.S.
License No. D9508

**RULING ON LICENSEE'S
MOTION FOR PROTECTIVE
ORDER AND COMMITTEE'S
MOTION TO COMPEL**

The above matter is pending before Administrative Law Judge Barbara L. Neilson on the Licensee's Motion for a Protective Order to preclude the Committee from taking Dr. El Deeb's deposition, which was filed on September 21, 2007, and the Committee's Motion to Compel Dr. El Deeb's deposition, which was filed on September 26, 2007. J. Sebastian Stewart, Manuel Cervantes, and Peter Krieser, Assistant Attorneys General, 445 Minnesota Street, Suite 1400, St. Paul, MN 55101-2131, represent the Board of Dentistry Complaint Committee ("the Committee"). Richard A. Lind, Sara J. Lathrop, and Susan E. Hettich, Attorneys at Law, Lind, Jensen, Sullivan & Peterson, P.A., 150 South Fifth Street, Suite 1700, Minneapolis, MN 55402-4217, represent the Licensee, Mohamed El Deeb, D.D.S.

Based upon the submissions of the parties, and for the reasons set forth in the Memorandum below,

IT IS HEREBY ORDERED as follows:

1. The Licensee's Motion for a Protective Order Precluding the Taking of Dr. El Deeb's Deposition is DENIED and the Committee's Motion to Compel the Deposition of Dr. El Deeb is GRANTED.
2. The deposition of Dr. El Deeb currently scheduled for September 27, 2007, shall be CANCELLED. The deposition shall instead proceed on a date in October that is mutually agreed upon by the parties.
3. The October 1, 2007, discovery deadline previously set in this proceeding shall be enlarged to the extent necessary to permit Dr. El Deeb's deposition to be taken.

Dated: September 26, 2007.

s/Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

Based upon the submissions of the parties, it appears that the Committee originally served a notice on May 8, 2007, to take the deposition of Dr. El Deeb on May 24, 2007.¹ Depositions of other individuals were also scheduled to be taken by the parties in May and June, 2007.² Prior to these depositions, the Licensee sought and obtained a modification in the discovery and hearing schedule. On May 21, 2007, the Administrative Law Judge issued a Revised Scheduling Order which, among other things, extended the discovery deadline to October 1, 2007, and continued the hearing until November 2007.

In a letter to Mr. Stewart and Mr. Cervantes dated May 22, 2007, Mr. Lind provided a list of the depositions that had been scheduled by the parties for May and June, including that of Dr. El Deeb, and then stated, "My understanding is that we will be continuing *these depositions* to September, 2007."³ In a letter to Elizabeth Morris (a paralegal working with Licensee's counsel) dated May 23, 2007, Marianne Ellis (a Legal Assistant working with counsel for the Licensee) confirmed that, based on the ordered changes in the discovery deadline and trial date, "we have also postponed the depositions of *all* witnesses to a later date."⁴

The Committee and the Licensee later rescheduled the depositions of several witnesses for September and October 2007.⁵ The Licensee contends that the Committee did not ask to reschedule Dr. El Deeb's deposition until September 12, 2007, when counsel for the Licensee verbally informed counsel for the Licensee that the Committee intended to reschedule the deposition of Dr. El Deeb.⁶ Counsel for the Licensee responded that "it was late to be thinking about rescheduling Dr. El Deeb's deposition with the discovery deadline fast approaching, counsel's calendar was very full, and [counsel] would have to talk to Dr. El Deeb about the request to reschedule his deposition."⁷ On September 19, 2007, the Committee served written notice rescheduling Dr. El Deeb's deposition for September 27, 2007.⁸ By letter dated September 19, 2007, counsel for the Licensee objected to the notice of deposition as untimely, overly burdensome, and unreasonable.⁹ By letter dated September 20, 2007, counsel for the Committee emphasized that Dr. El Deeb's deposition was originally noticed in May 2007 and noted that the Committee was willing to conduct the deposition in October rather than on September 27.

¹ Affidavit of Peter Krieser ¶ 2 and Ex. 1; Affidavit of Susan Hettich ¶ 5.

² Exs. 1 and 2 attached to Krieser Affidavit.

³ Ex. 2 attached to Krieser Affidavit (emphasis added).

⁴ Ex. 5 attached to Hettich Affidavit (emphasis added).

⁵ Exs. 6-8 attached to Hettich Affidavit.

⁶ Hettich Affidavit ¶ 7.

⁷ Hettich Affidavit ¶ 8.

⁸ Hettich Affidavit ¶ 9 and Ex. 9; Krieser Affidavit ¶ 6.

⁹ Hettich Affidavit Ex. 14; Krieser Affidavit ¶ 6.

The Licensee asserts that Dr. El Deeb already provided lengthy oral and written responses to the Committee regarding the allegations in this case, and points out that the Committee has obtained a transcript of a deposition taken of him in separate litigation involving Delta Dental. The Licensee thus argues that the Committee has no need to take a deposition prior to the contested case hearing. In addition, the Licensee contends that it will take several hours and up to a day to prepare Dr. El Deeb for his deposition and there is insufficient time before the close of discovery on October 1 to engage in this preparation. The Licensee also maintains that Mr. Lind will be out of town on business on September 27, 2007, and is unable to attend the scheduled deposition, and Dr. El Deeb will have to reschedule patients and arrange his schedule to attend a deposition.¹⁰ The Committee argues in response that it is necessary to depose Dr. El Deeb because some of his handwritten notes are difficult to decipher, he has not been questioned regarding the specific theories which underlie the Committee's case, and two patients involved in the current case were not part of the separate litigation in which he has been involved.¹¹

Under the circumstances presented here, the Administrative Law Judge concludes that the deposition of Dr. El Deeb should be allowed, but that it should be rescheduled for a mutually convenient date in October. Based upon a fair reading of the correspondence between the parties, it appears that they jointly agreed to postpone *all* of the depositions that were originally scheduled last May, including that of Dr. El Deeb, not just the expert depositions as the Licensee contends. While it would have been preferable if the Committee had reiterated its interest in taking Dr. El Deeb's deposition prior to September 12 and had taken earlier steps to find an agreeable date, the Administrative Law Judge cannot conclude that the notice that was provided by the Committee was unreasonable under these facts. The Committee has provided an explanation of the reasons why it is seeking the deposition and has shown that the deposition is needed for the proper presentation of its case, in accordance with Minn. R. 1400.6700, subp. 2. There has been no showing that the deposition is being sought for purposes of delay or to harass Dr. El Deeb, and it is evident that the issues involved in this contested case are sufficiently significant to warrant the discovery. The rescheduling of the deposition will ensure that Dr. El Deeb has an adequate opportunity to arrange his schedule and prepare for the deposition, and will also enable lead counsel to accompany him.

B. L. N.

¹⁰ Hettich Affidavit ¶¶ 10-15 and Ex. 2.

¹¹ Krieser Affidavit ¶ 7.